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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GUARDIAN PLANS, INC. *et al.*,
Petitioners,

v.

JOSEPH W. TEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONERS

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Dated: July 28, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Motion for Leave to File Brief as Amici Curiae in Support of Petitioners

Pursuant to Rule 36.1 of this Court's Rules, the American Cemetery Association and the Southern Cemetery Association ("Amici") move for leave to file their brief amici curiae supporting the petition for a writ of *certiorari*. This motion is necessitated by the refusal of all of the respondents to grant their consent for the amici to file this brief. All of the petitioners have granted their consent to the filing of this brief. The amici curiae brief, conditionally filed herewith, is annexed to the motion.

In the instant case, the Fourth Circuit has upheld as constitutional a Virginia statute which prohibits the dissemination of accurate information by telephone concerning the sale of funeral goods and services in advance of need (preneed), and which is not directed at any other products or services. Telemarketing of the exact type prohibited by the Virginia statute is a widespread practice in the funeral services industry among the members of Amici. The Fourth Circuit's decision has also provided impetus for similar preneed telemarketing prohibitions in other states. Due to the serious impact which the instant case threatens to have on their members, Amici respectfully request leave to file the attached brief amici curiae in support of the petition.

Dated: July 28, 1989

Respectfully submitted,

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On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE

The Fourth Circuit's opinion upholds as constitutional a Virginia statute which prohibits the dissemination of accurate information by telephone concerning funeral goods and services in advance of need (preneed), and which is not directed at any other products or services.

Amicus, American Cemetery Association (ACA), has approximately two thousand members composed of

cemeteries and combined funeral home-cemetery establishments throughout the United States. Amicus, Southern Cemetery Association (SCA), has approximately four hundred members composed of cemeteries and combined funeral home-cemetery establishments throughout the Southern United States. Telemarketing of the exact type prohibited by the Virginia statute is a widespread practice in the funeral services industry among the members of Amici. The Fourth Circuit's decision has provided impetus for similar preneed telemarketing prohibitions in other states. Amici contend that the decision will have a severe adverse impact upon the funeral services industry and on the public served by the industry.

SUMMARY OF ARGUMENT

Amici urge the Court to consider whether the Fourth Circuit erred in upholding a Virginia statute prohibiting the use of the telephone to convey accurate pre-sale information concerning funeral goods and services. The opportunity for such telephone communication is of great importance to the members of Amici and the state has available a host of less restrictive means to protect its citizens from abuse. Further, in its proper context, the issue is one having a nationwide impact.

The purchase of a traditional funeral and burial arrangement is the third largest expenditure many consumers will be required to make. When purchased at need, that is, when a death has occurred or is imminent, consumers are forced to make decisions involving thousands of dollars within limited time constraints and often in a state of emotional distress.

The pre-arranged or preneed purchase of funeral and burial arrangements allows consumers to avoid these pressures. In addition, preneed agreements are revocable by the purchaser in many states, have a three-day cancellation time period provided by federal law for in-home sales, and usually result in monetary savings for the consumer in the long-term. The Fourth Circuit itself has previously acknowledged that consumers desire pre-sale funeral information by telephone and that state legislatures cannot be relied upon to enact pro-competitive legislation since they are dominated by industry interests. The existing regulatory legislation in Virginia which was upheld by the Fourth Circuit forestalls the interplay of traditional forces in the market, resulting in a lack of price competition and information regarding products and services which consumers ultimately must acquire.

ARGUMENT

I. Introduction

During the 1970s and 1980s, the Federal Trade Commission (FTC) amassed a valuable and extensive record concerning funeral industry trade practices in conjunction with the development and promulgation of its Funeral Industry Practices Trade Regulation Rule ("Funeral Rule"), 16 CFR Part 453. While the provisions of the Rule are not at issue here, many of the FTC's findings and conclusions directly relate to the issues being presented for the consideration of this Court in the instant case. Furthermore, the court below explicitly acknowledged the extent of the FTC's investigation into funeral industry practices in *Harry*

and Bryant Co. v. FTC, 726 F.2d. 993 (4th Cir. 1984),[1] a case which challenged the validity of the Funeral Rule.

The Fourth Circuit upheld the Funeral Rule in *Harry and Bryant Co.* stating that the Commission had found substantial evidence to conclude that certain industry practices were unfair and misleading, including the lack of telephone information disclosure.[2] The court below recognized that "a large number of surveys show that the majority of consumers desire pre-sale information about the cost of funeral goods and services" (Id. at 999), that "widespread refusal to disclose price information (by telephone) was virtually conceded during the rulemaking by the National Funeral Directors' Association" (Id. at 1000, footnote 5), and that the FTC Presiding Officer and Commission staff concluded that "state regulation against deceptive funeral practices was dominated by industry interests." (Id. at 996).

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[1] "In response to the FTC's notice, more than 9000 documents, comprising in excess of 20,000 pages, were submitted by interested parties, including consumers and industry representatives. During the fifty-two days of hearings 315 witnesses testified. The witnesses also presented exhibits and underwent cross-examination by participating parties or the FTC's Presiding Officer. The hearings generated 14,719 pages of transcripts and approximately 4,000 additional pages of exhibits. Thereafter, another comment period was held for rebuttal of any materials previously admitted into evidence. Forty-seven rebuttal submissions were received." (Id. at 996).

[2] In so holding the Fourth Circuit cited this Court's ruling in *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 522 (1981) [quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)] in characterizing the scope of the substantial evidence test when applied to rulemaking. (Id. at 999).

The FTC Final Staff Report on Funeral Industry Practices[3] found that "for many consumers, the telephone is the only medium available for ascertaining the price levels and offerings of different funeral homes. Access by telephone to such information is vital if funeral consumers are to have any meaningful opportunity to comparison shop." (Id. at 359-360, footnote omitted).

It is ironic that the Fourth Circuit would uphold a federal regulation **requiring** funeral homes to provide information by telephone on request in *Harry and Bryant Co.*, and then uphold a Virginia statute **prohibiting** funeral homes from initiating telephone calls which can provide the consumer with the exact same information. Amici do not take issue with the Fourth Circuit's concern for protecting the public from intrusive huckstering in the emotionally charged environment existing when a death has occurred or is imminent, the main characteristic of "at need" funeral purchases.

However, amici respectfully contend that the Fourth Circuit's apparent distinction between a required telephone disclosure and a voluntary telephone solicitation is based upon a failure to recognize the enormous differences between the "at need" funeral arrangement and a "preneed" or prearranged funeral plan. Amici are especially perplexed that the Fourth Circuit based its opinion in the instant case on its own analysis in a companion decision, *National Funeral Ser-*

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[3] Bureau of Consumer Protection, Federal Trade Commission, Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule (16 CFR Part 453), June 1978.

vices, Inc. v. Rockefeller, 870 F. 2d 136 (4th Cir. 1989), which likewise failed to distinguish between at need and preneed forms of solicitation.

II. The Characteristics of Making At-Need Funeral Arrangements Place Consumers at an Emotional and Financial Disadvantage

The FTC Statement of Basis and Purpose (47 Fed. Reg. 42260) issued in conjunction with the publication of the final version of the Funeral Rule discussed funerals pragmatically in terms other than religious and social rituals. The Commission found that a funeral was the third largest single expenditure that many consumers will ever make, after a home and a car. The FTC estimated the cost of a funeral, including burial, in 1982 averaged between two and three thousand dollars. Today, consumer organizations such as the American Association of Retired Persons estimate the average cost of a funeral at five thousand dollars. Based upon an annual death rate in the United States of approximately 1.9 million, the total amount spent by consumers on funeral and burial arrangements could be as high as 9.5 billion dollars per year. (Id.)

It is beyond question that the purchase of a funeral is an important financial transaction for consumers. Yet it is often made under circumstances which reduce the ability of consumers to make careful, informed decisions due to the pending or actual death of a family member or friend. In addition, the FTC found that consumers lacked familiarity with the funeral transaction itself: nearly fifty percent of all consumers have never arranged a funeral and another twenty-five percent have done so only once. (Id.)

Consumers must also make potentially costly decisions under severe time constraints. Within hours of death, consumers must authorize for the remains to be removed from the place of death to a funeral home and arrange for embalming. Within at most twenty-four to forty-eight hours additional decisions must be made including the purchase of a casket, the use of the funeral home facilities, burial arrangements including a vault or graveliner, or cremation, and memorialization. (Id.)

The FTC Final Staff Report on Funeral Industry Practices specifically discussed the disadvantaged state of the consumer when making at-need arrangements:

> The handicapped bargaining position of the funeral purchaser is the product of a number of different factors. The most significant of these are:
> (1) emotional trauma;
> (2) guilt;
> (3) dependency and suggestibility;
> (4) ignorance; and
> (5) time pressure. (supra at 159)

The report discussed each of these factors in depth. However, even assuming total industry compliance with the Funeral Rule, it can at best prevent or remedy only one of the five factors, ignorance. Therefore, consumers' ability to make clear and well-considered decisions regarding funeral purchases develop only when all five factors are absent, which is the essence of the preneed transaction.

III. The Characteristics of Soliciting Preneed Funeral Arrangements Enable Consumers to Make Informed Choices Including the Postponement or Cancellation of any Purchase

Industry observers have estimated that approximately thirty percent of current funerals are purchased on a preneed basis.[4] Such pre-purchased arrangements provide a number of benefits to consumers which are, by circumstances, absent from at-need purchases. As noted in a recent Commission-authorized Bureau of Competition "intervention letter,"[5] preneed selling enables consumers to shop comparatively and make purchase decisions without the time and emotional pressures associated with at-need transactions. The FTC also noted that preneed purchases allow consumers to obtain a hedge against the increasing cost of funerals by "locking in" the price of goods and services as of the time of purchase. (Id. at 2a)

In addition to the comparative leisure at which consumers may consider or reject the making of preneed arrangements, consumers benefit in other ways. Federal law[6] provides for a three-day "cooling-off" period to cancel preneed sales made in the home, and an increasing number of states are providing additional

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[4] Bureau of Consumer Protection Staff Report to the Federal Trade Commission, Mandatory Review of the Funeral Industry Practices Trade Regulation Rule (16 CFR Part 453), April 1988, at page 41, footnote 84.

[5] February 9, 1989 letter, Jeffrey I. Zuckerman, Director, Bureau of Competition, FTC, to Honorable Franklin R. Hall, Member, Virginia General Assembly House of Delegates. (Appendix at 1a)

[6] FTC, Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 CFR Part 429.

cancellation time periods of thirty days or longer. Some states, including Virginia, provide for an unlimited right to cancel preneed funeral agreements prior to the furnishing of the goods and services. Financially, preneed agreements are often paid on an installment basis ranging between thirty-six and sixty months with terms of financing regulated by the federal Truth in Lending statute.[7]

A model state statute regulating preneed funeral sales[8] has been developed and circulated by the American Association of Retired Persons (AARP) on behalf of its nearly thirty million members. Among the areas which the AARP model law seeks to regulate are refund provisions, whether the contract is a guaranteed or non-guaranteed price agreement, and the amounts to be escrowed to assure the seller's performance.

It is significant that the AARP model law contains no prohibitions on either door-to-door or telephone solicitations but sensibly provides for the seller to identify himself, his product, and make an appointment with the prospective buyers.[9] Amici contend that if the needs of consumer protection actually required

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[7] Truth in Lending Act, 15 USC § 1601, Regulation Z, 12 CFR Part 226.

[8] A Model Law for Prepaid Funeral Arrangements, developed by Consumers Affairs, Program Department, American Association of Retired Persons. (Fourth Circuit App. Tab 32 at 565)

[9] In its commentary, AARP notes "This section offers the consumer the convenience of telephone and door-to-door sales while limiting the potential for harassment. Further protection is provided by existing state and federal regulations such as the FTC Door-to-Door Sales Rule and by the cooling-off period mandated by the model act."

the complete prohibition of telephone preneed solicitation, as in the Virginia law, then the impetus would logically come from AARP and its huge constituency. Clearly the opposite is the case.

Recent surveys by AARP[10] indicate that the majority of consumers are interested in receiving prices and other information relating to funerals by telephone. For example, 57 percent of respondents in AARP's Excel survey of consumer opinion think price information should be available over the telephone.[11] This same data, according to AARP, also suggest that consumers are willing to use telephone and other price information to comparison shop. Nearly 50 percent of the respondents in the Excel survey stated that they would consider evaluating different funeral providers.[12]

Amici are unaware of the existence of any studies, surveys or other reports which indicate that consumers are opposed to receiving preneed funeral information by telephone, or believe that the industry should be singled out to prohibit the solicitation of preneed funeral arrangements by telephone. In addition, recent FTC "intervention" letters commenting

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[10] Consumer opinion surveys by Gallup and other organizations were commissioned by AARP and submitted to the FTC as part of the Commission's current Mandatory Review of the Funeral Industry Practices Trade Regulation Rule. The survey results are summarized in the Proposed Findings of Fact, Conclusions, and Recommended Decision of American Association of Retired Persons, Public Record No. 215-66, R-M-11.

[11] In the Matter of the Mandatory Review of Funeral Industry Practices Trade Regulation Rule, 16 CFR Part 453, Public Record No. 215-66, McFadden, R-HX-8 at Exhibit B, p. 16.

[12] Id. at 14.

on proposed state legislation warn that restrictions on the flow of information, including telephone and door-to-door solicitation, may make it more difficult for consumers to learn about various prices, levels of quality, and types of services available.[13]

The FTC observed that when it is more difficult for consumers to compare prices and other options, firms are protected from competition and their incentive to keep prices down and to offer alternatives is reduced. "Restrictions on solicitation may also make it more difficult for competitors, especially new market entrants or those offering innovative services, to obtain clients."[14]

IV. Purported State Interests in "Protecting" Consumers from Preneed Funeral Solicitation Result in Anti-Competitive Legislation

A. Industry Concerns Dominate State Boards and Legislatures

In conjunction with its investigation into industry practices, the FTC conducted an inquiry into state regulatory statutes and the relationship between state legislatures, governing boards and the industry. The Commission staff recognized that state corrective action of industry abuses was preferable to federal regulation since enforcement and compliance could be monitored better locally.[15] However, the FTC staff

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[13] FTC letter to Honorable Franklin P. Hall, dated February 9, 1989, supra, commenting on proposed Virginia House Bill No. 1265 which would prohibit door-to-door and telephone solicitation of preneed funeral plans (Appendix at 4a). The measure was subsequently enacted into law.

[14] Id. at 4a.

[15] FTC Bureau of Consumer Protection Staff Report, April 1988, supra, at 65-66.

found that the vast majority of state funeral regulations were concerned with technical or licensing procedures rather than substantive measures to reduce consumer abuses.[16]

Staff also observed that state licensing boards were composed almost exclusively of morticians, and that funeral director trade associations exerted an enormous influence on the boards and their activities. "Often, the associations and the state licensing authorities are indistinguishable from one another in terms of composition, positions on issues and perceptions of their responsibilities."[17]

The staff report found that the "unstartling result" of this association/state board collaboration was that the boards tended to operate as an arm of the associations, under the color of state law, and served the interests of funeral director constituents rather than as consumer protectors.[18] This finding is particularly underscored with respect to the state of Virginia by the evidence presented in Petitioners' Brief at 3 and 4.

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[16] Final Staff Report to the FTC, June 1978, supra at 102. The report continued: "Many of the regulations have been drafted and sponsored by funeral director associations and are directed toward enhancing the image of the funeral director as a professional and guardian of the health of the community. The limited substantive conduct standards that can be found in state regulations typically ignore the crucial portion of the funeral transaction when the consumer is purchasing merchandise and services from the funeral director." (Id. at 102-103, footnotes omitted).

[17] Id. at 103.

[18] Id. at 104.

Furthermore, staff reported that the protection and promotion of funeral industry interests in state regulations were carried out by well-organized and effective lobbying networks, including the employment of paid lobbyists. Various state association lobbying efforts have defeated mandatory price itemization proposals and other bills aimed at weakening the industry domination of state boards by adding consumer representation.[19]

B. Existing State Legislation Insulates Industry Members from Competition.

Examining the particular statutes and regulations in the various states, the FTC staff found that many had a common purpose of protecting industry members from competition.[20]

Rules and regulations administered by the state boards control competitive behavior including marketing techniques for preneed funerals. In addition to the anti-solicitation laws, the staff found that re-

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[19] Id. at 138-139.

[20] "It is also apparent that many restrictive state regulations operate not to provide badly-needed information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition. The laws restrict competition among funeral directors and from other entities which seek to offer funeral services and merchandise or to assist consumers in making funeral arrangements. Many of the laws create barriers to entry into the occupation and to the offering of low cost funeral services. Others, which prohibit cemetery-mortuary combinations, discourage funeral directors from cooperating with memorial societies and limit the sale of certain funeral merchandise to licensed undertakers, operate to inhibit competition and to ease forces that could exert a downward pressure on prices." (Id. at 103)

stricting the sale of funeral merchandise to licensed funeral directors severely limited preneed competition. In some states, the term "funeral merchandise" was defined so broadly that it included items normally sold by cemeteries such as burial vaults.[21]

An updated review of state regulatory statutes conducted in 1987 by the FTC staff found that relatively few states had amended their laws in the intervening years to include the various provisions of the Funeral Rule. For example, only thirteen states required funeral providers to give consumer price information over the telephone.[22]

Since 1985 the FTC staff have responded with "intervention" letters to requests by state legislators to comment on proposed industry-related bills.[23] Most of the proposals reviewed involve anti-solicitation restrictions on preneed funeral plans and the selling of funeral merchandise by only licensed funeral directors, provisions which are part of the Virginia law in the instant case. With regard to efforts prohibiting preneed door-to-door and telephone solicitation in Virginia, a recent Commission-authorized letter stated

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[21] Id. at 118-119.

[22] Bureau of Consumer Protection Staff Report, April 1988, supra, at 68-69.

[23] FTC staff have submitted such comments to Illinois State Senator Judy Baar Topinka (May 31, 1985) Fourth Circuit App. Tab 33 at 588-589; Alabama Representative Arthur Payne (January 16, 1986); Kansas State Representative Ginger Barr (February 14, 1986); the Illinois Department of Registration and Education (May 9, 1986); Oregon State Representative Chuck Sides (April 6, 1987); and Virginia House Delegate Franklin P. Hall (February 9, 1989) supra; also Congressman Steny H. Hoyer (November 23, 1988).

that such broad proscriptions, including solicitation where there is little or no risk of coercion, harassment, or similar abuses, "may unnecessarily restrict the dissemination of truthful information about and sales of preneed funeral plans to willing and competent purchasers."[24] As an alternate but less restrictive means of preventing such abuses, the FTC letter endorsed a provision in the Virginia bill, which was the subject of the letter, allowing consumers the right to cancel any preneed funeral agreement prior to the furnishing of the services or goods.[25] However, the proposed Virginia statute was subsequently enacted into law containing **both** the cancellation provision and the prohibition of telephone and door-to-door preneed solicitation.

C. The Fourth Circuit's Decision Has Caused Similar Prohibitions on Preneed Solicitation to be Introduced into Other States

The Virginia bill, H.B. 1265, as discussed above, was proposed and passed by both houses of the legislature after the federal district court in this case had upheld the constitutionality of a similar prede-

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[24] FTC letter to Honorable Franklin P. Hall, supra, at 5a.

[25] Article 5, Section 54.1-2820 (A) (7) to Chapter 28 of Title 54.1 of the Code of Virginia, as added, now states, that a preneed funeral contract must provide "that any person who makes payment under the contract may terminate the agreement at any time prior to the furnishing of the services or supplies contracted for; if the purchaser terminates the contract within thirty days of execution, the purchaser shall be refunded all consideration paid or delivered, together with any interest or income accrued thereon; if the purchaser terminates the contract after thirty days, the purchaser shall be refunded any amounts required to be deposited under § 54.1-2822, together with any interest or income accrued thereon."

cessor statute.[26] The bill was subsequently signed into law after the Fourth Circuit affirmed the decision in March 1989. Although many state legislatures were adjourned or near adjournment in the next few weeks when the decision was circulated among industry groups, similar though expanded measures were introduced into at least three state legislatures.

The Fourth Circuit limited its ruling to preneed funerals but by April 5th an Indiana Senate bill[27] was amended to prohibit both cemetery and funeral home preneed solicitation by telephone and door-to-door. Amici were informed by members in that state that both the instant case and its companion decision, *National Funeral Services, Inc. v. Rockefeller*, supra, were cited as authority to justify passage.

Also in April, a Pennsylvania House bill[28] was proposed to severely restrict the solicitation by telephone of all products and services with cemetery lots and time-share estates being singled out for specific reference. In May, a bill was introduced into the Maine House of Representatives[29] which would prohibit all forms of preneed solicitation by cemeteries. Maine already prohibits any form of preneed solicitation by funeral homes.

Amici believe that this reaction stemming from the Fourth Circuit's decision in so relatively short a time

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[26] H.B. 1265 was apparently enacted to avoid the issue of constitutional vagueness as applied to preneed sales which involved its predecessor statute, the subject of the instant case.

[27] Indiana Senate Bill 101.

[28] Pennsylvania House Bill 827.

[29] Maine House Bill 1127.

period strongly suggests that anti-solicitation proposals affecting preneed sellers of funeral homes and cemeteries will be introduced when state legislatures convene in 1990. As the FTC has cautioned, these measures are anti-competitive, anti-consumer, and serve only to protect entrenched industry interests. However, advocates of these measures can claim that the Fourth Circuit ruling supports their position.

CONCLUSION

Telemarketing is an established and widespread means for marketing legitimate services and products in the United States. It is widely used in the funeral industry in the solicitation of pre-need sales. It has been prohibited by the Virginia legislature, and as a result of the Fourth Circuit's decision similar prohibitions have been introduced into other states. This Court, in its prior decisions, has not yet considered this topic. It undoubtedly constitutes a severe restriction on the right of free commercial speech on the part of the members of a major industry to communicate information of great importance to consumers.

For these reasons, the Court is respectfully requested to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and upon review of the opinion and judgment, to reverse the judgment below and enter a judgment for Petitioners.

Respectfully submitted,

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Dated: July 28, 1989

APPENDIX

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 9, 1989

COMMISSION AUTHORIZED

The Honorable Franklin P. Hall
Member, House of Delegates
General Assembly of Virginia
Suite One, Seven Hundred Building
7th & Main Streets
Richmond, Virginia 23219

Dear Mr. Hall:

We are pleased to respond to your request for our views on House Bill No. 1265 concerning the sale of pre-need funeral arrangements.[1] You specifically requested our views about provisions of the proposed legislation that would permit only licensed Virginia funeral directors to engage in "preneed funeral planning" and that would prohibit solicitation of pre-need contracts through telemarketing. We believe that these restrictions could unnecessarily reduce competition and injure consumers.

For several years, the Commission staff has endeavored to identify restrictions within a number of professions, including the funeral services profession, that limit competition, increase costs and harm consumers without providing countervailing benefits. The Commission staff has cautioned against proposed statues and regulations in sev-

[1] These comments are the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner.

eral states that unnecessarily restrain competition and limit consumer choice in the purchase of pre-need funeral plans.[2]

Pre-need sales of funeral goods and services have been increasing throughout the country. These arrangements enable consumers to shop comparatively and make purchase decisions without the time and emotional pressures generally associated with "at-need" purchases. Pre-need purchases may also allow consumers to obtain a hedge against the increasing cost of funerals by "locking in" the price of goods and services as of the time of purchase.

Despite the benefits associated with pre-need arrangements, the Commission staff has found that many states have regulations that limit the ability of pre-need sellers to compete in the market for funeral goods and services. While states have a legitimate interest in protecting consumers from the fraudulent or deceptive practices of some pre-need plan sellers, consumers may be injured by regulations that inhibit price competition, retard innovation, or limit the availability of legitimate alternative goods and services in the funeral industry.

The Commission is concerned with restrictions that allow only licensed funeral directors to sell pre-need funeral plans, including funeral goods and arrangements for providing funeral services. Such restrictions may harm consumers by preventing the introduction and development of innovative forms of competition and lower cost alternatives for funeral products and services for which the professional expertise of a funeral director is not required. For example, consumers may be harmed if owners of cemeteries and manufacturers of funeral goods are completely prohibited from selling caskets and burial vaults to consumers

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[2] We have submitted such comments to Illinois State Senator Judy Baar Topinka (May 31, 1985); Alabama Representative Arthur Payne (January 16, 1986); Kansas State Representative Ginger Barr (February 14, 1986); the Illinois Department of Registration and Education (May 9, 1986); and Oregon State Representative Chuck Sides (April 6, 1987).

in Virginia. Similarly, consumers may be harmed if persons who might otherwise act as independent retailers or brokers of preneed funeral plans are prohibited from competing with licensed funeral directors in the sale of such plans. By dealing with more than one funeral home, a broker may be able to obtain terms more favorable to the consumer.[3]

These restrictions may also prevent funeral directors from operating more efficiently. For instance, a funeral director may wish to use employees or agents to sell preneed funeral plans. These employees or agents would not require the technical skills of funeral directing because they would not be engaged in that activity, yet the proposed legislation may prohibit them from selling such plans.[4]

The second issue you raised in your letter concerns the proposed restrictions on pre-need solicitation using the telephone. You stated that the proposed restraint on the use of telemarketing to solicit pre-need funeral business would be the first such restriction imposed on any profession in Virginia. The proposed legislation would prohibit

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[3] The Commission staff has also expressed a related concern with potentially anticompetitive certification requirements. The staff was asked to comment on an Oregon legislative proposal that persons wishing to sell pre-need funeral contracts must obtain certification from the state Mortuary and Cemetery Board. The staff noted that several members of the certifying Board would be potential competitors of the pre-need sellers seeking certification, and that the bill was unclear as to the grounds that would permit the Board to withhold certification. In such circumstances, there is some danger that the certification process may be used to hinder entry by new competitors.

[4] Generally, only licensed funeral directors are able to provide services needed for the disposition of human remains. It may therefore be desirable to ensure that measures are taken to prevent pre-need sellers who are not licensed funeral directors from misrepresenting what is included in a given pre-need plan. This should include some protection against a misrepresentation of the relationship that exists between the pre-need seller and a licensed funeral director.

all "in-person communication," which the bill defines to includes both face-to-face and telephone solicitation.

Effective communication of truthful commercial information by sellers to potential customers is critical to the functioning of competitive markets. Restrictions on the flow of information may make it more difficult for consumers to learn about the various prices, levels of quality, and types of services that are available. When it is more difficult for consumers to compare prices and other options, firms are protected from competition, and their incentive to keep prices down and to offer alternatives is reduced. Restrictions on solicitation may also make it more difficult for competitors, especially new market entrants or those offering innovative services, to obtain clients.

This is not to say that solicitation is always appropriate.[5] In certain circumstances, solicitation may be so susceptible to abuse that restrictions may be justified. In the funeral industry, for example, restrictions on solicitation in at-need situations (after death has occurred or where death is imminent) may be justified because of the substantial risk of undue influence.

Similarly, the legislature might determine that, in certain circumstances, even pre-need in-person solicitation

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[5] In its decision in American Medical Association, 94 F.T.C. 701 (1979), *aff'd*, 638 F2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided Court*, 455 U.S. 676 (1982), the Federal Trade Commission held that an AMA code of ethics provision prohibiting virtually all advertising and solicitation by physicians violated Section 5 of the Federal Trade Commission Act. The Commission found that the "AMA's broad proscription of advertising and solicitation [had], by its very essence, significant adverse effects on competition among AMA members." *Id.* at 1005. The Commission did provide in its order, however, that "in view of the potential overreaching that may occur in the absence of professional regulation," the AMA could proscribe "uninvited in-person solicitation of actual or potential patients, who, *because of their particular circumstances*, are vulnerable to undue influence." *Id.* at 1029-30 (emphasis added).

could be susceptible to coercion, harassment, or similar abuses. This does not, however, justify limitations that are more restrictive than reasonably necessary to prevent such abuses. Restrictions that prohibit all face-to-face and telephonic pre-need solicitation, including solicitation in situations where there is little or no risk of coercion, harassment, or similar abuses, may unnecessarily restrict the dissemination of truthful information about and sales of pre-need funeral plans to willing and competent purchasers.

Moreover, there may be less restrictive means of preventing such abuses. For example, the proposed bill would add Art. 5, § 54.1-2820 (A) (7) to Chapter 28 of Title 54.1 of the Code of Virginia to require that any pre-need funeral contract contain a provision allowing the consumer to "terminate the agreement at any time prior to the furnishing of the services or supplies." This requirement would afford consumers considerable protection from abusive solicitation.[6]

In addition, pre-need solicitation or sales may be subject to the requirements of the FTC's Funeral Industry Practices Rule.[7] The Funeral Rule requires that "funeral providers" give itemized price lists to consumers and prohibits misrepresentations of legal, cemetery and crematory requirements. A "funeral provider" is "any person, partnership, or corporation that sells or offers to sell funeral

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[6] Similarly, the Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429, which requires that a seller give notice of the consumer's right to rescind a sale within three business days, applies to most sales of pre-need funeral arrangements that do not occur at the seller's place of business. However, this rule does not apply to certain transactions. For instance, it does not apply to sales conducted entirely by telephone or mail, or sales made as part of an insurance contract. 16 C.F.R. Part 429.1, Note 1 (a)(4) and (a)(6) (1988).

[7] 16 C.F.R. Part 453 (1988).

goods and funeral services to the public."[8] Many sellers of pre-need funeral arrangements may not be subject to the Funeral Rule's requirements, however, either because they are not "funeral providers"—that is, they do not sell both funeral goods and funeral services—or because they are engaged in the "business of insurance."[9] Thus, permitting persons other than funeral directors to sell preneed arrangements might benefit consumers by increasing competition in that market, though it is possible that consumers would be harmed by such authorization because the Funeral Rule's provisions may not apply to all of these sellers.

For the reasons set out above, we believe that the provisions of H.B. 1265 that would permit only licensed funeral directors to engage in "preneed funeral planning" and that would prohibit solicitation of pre-need contracts through telemarketing may unnecessarily restrain competition and hinder the sales of pre-need funeral goods and services in Virginia.

We hope that our comments will be helpful to you. We appreciate the opportunity to present our views and would be happy to provide any further assistance you might request.

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[8] 16 C.F.R. § 453.1(j) (1988).

[9] The Federal Trade Commission Act, which provides the statutory authority for the Commission's trade rules, does not apply to the business of insurance to the extent that it is regulated by state law. 15 U.S.C. § 1012; 16 C.F.R. § 453.8(c) (1988). The Commission is currently reviewing the Funeral Rule and plans to decide whether to leave the rule unchanged or to amend or repeal it by October 31, 1989. 53 Fed. Reg. 19864 (May 31, 1988). If the Commission ultimately decides to amend the rule to apply to all sellers of pre-need funeral arrangements or, on the other hand, to exempt all pre-need sellers, funeral directors and others who sold pre-need arrangements would not longer be treated differently under the rule. However, sales that constitute the "business of insurance" would continue to be exempt from the Funeral Rule even if the definition of "funeral provider" were changed.

Sincerely,

Jeffrey I. Zuckerman
Director
Bureau of Competition